



Altus Helyar

Contamination Issues on Expropriation

A Valuation Perspective

BC Expropriation Association
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Carl Nilsen

Valuation Framework



CUSPAP Requirements

- Obligation to Identify “Detrimental Conditions” [1480]
- Effect may be measurable by simply deducting cost
- Other factors: stigma, effect on HABU
- Need to address known detrimental conditions in order to avoid misleading report
- Appraiser not typically qualified to assess remediation costs – may reasonably rely on other professionals
- Where contamination known to exist, may appraise under “hypothetical condition” that site is clean. Requires extraordinary assumption. [6335]

Valuation Framework



Basic Formula

Impaired Value =

Unimpaired Value

Less

- **Cost Effects (Cost of Remediation and related on-going costs)**
- **Use Effects (Highest and best use impacts)**
- **Risk Effects (Uncertainty of costs both now and in the future)**

Valuation Methods

- **Analysis of case studies**
- **Paired sales**
- **Multi Regression analysis**
- **Market interviews**
- **Adjustment of Yields and Cap Rates**

Valuation Framework



Cost Effects

- Cost of complete remediation (“dig and dump”)
- Risk Management – site monitoring (ground water monitoring, pumping and disposal, containment of groundwater).
- Off-site liabilities
- Agreements for remediation by others can off-set costs to owner

Use Effects

- Highest and best use may be different for a contaminated site depending on the cost alternatives
- Duration of existing use may be extended
- Consideration of “Value in Use” v. “Market Value”

Valuation Framework



Risk Effects – Uncertainty Regarding:

- Nature of the contamination
- Extent of the problem – has all contamination been identified?
- Degree to which government regulations may change in the future
- Events which give rise to need for remediation
- Ability to finance
- Potential off-site liabilities
- Costs required to obtain Certificate of Compliance
- Impact on future redevelopment potential
- “Responsibility” under the Environmental Management Act

Uncertainty can be mitigated by...

- Establishing Remedial Action Plan and Risk Assessment/Management Plan. Obtaining Certificate of Compliance.
- Establishing liability

The Expropriation Context



Cases considering Contamination

- ***Masae Ltd. v. Toronto 1992 [49 LCR]***
 - “The Board can find no law on how the cost of soil clean-up should affect the market value of expropriated land.”
 - Cost of clean-up deducted from “Market Value”
- ***Pay Less Gas Co. (1972) Ltd. v. MoTH 2001 [74 LCR]***
 - Authority had incurred costs to clean-up the soils before they could be used in highway project
 - Insufficient evidence as to extent and impact on market value; contamination not raised in pleadings. Board made no adjustment.
- ***Geneen et al. v. City of Toronto 2001 [77/LCR]***
 - Highest and Best Use was continuation of existing (industrial) use
 - Evidence provided by appraiser was that “traditional discounting” negated meaningful adjustment and that market transactions indicated no adjustment

The Expropriation Context



The Highest and Best Use Issue

- ***Baines v. MoTH 1997 [61/LCR]***
 - Partial taking from land underlain by coal mine workings
 - Danger of subsidence over time
 - Land proposed to be subdivided for single family use
 - Development costs for single family much higher than for a mobile home park
 - Issue categorized as being cost of remediation works for different development options and impact on Highest and Best Use – whether single family subdivision or mobile home park
 - Because of risks and uncertainties at date of taking (not specific costs) Board considered HABU as mobile home park
 - Compensation awarded on basis of comparable sales of land suitable for mobile home park use

The Expropriation Context



The Highest and Best Use Issue (*continued*)

- ***Holdom v. BC Transit, Chevron Canada Ltd. v. BC Transit 2005 [85 LCR]***
 - Partial taking for SkyTrain
 - Site was contaminated and had not been remediated to environmental standards
 - Appraiser's opinion with respect to single family use not found to be convincing
 - Commercial use, based on evidence of other appraisers, found to be the Highest and Best Use after the taking

The Assessment Context



- ***Vancouver Chinatown Merchants Association*** [PAAB 20013793;2002 BCSC 721]
 - Parkade with economic life of 25+ years
 - Complete remediation costs estimated by taxpayer (appellant) at \$9 million (after demolition of the property). Consultant referred to “other options”.
 - Annual Risk Management costs
 - Appellant estimated negative effect of contamination based on:
 - Present Value of Remediation Costs
 - Capitalized value of annual Risk Management costs
 - Adjustment to capitalization rate (9% to 12%) to allow for risk and uncertainty

The Assessment Context



- ***Vancouver Chinatown Merchants Association*** [PAAB 20013793;2002 BCSC 721] (continued)
 - Assessor considered that no adjustment was applicable; believed site was remediated
 - Board found that “other option” would be less costly and therefore appropriate. Rejected deduction of complete remediation costs
 - Board identified risks as being:
 - Risk management costs are incurred and could be subject to change
 - Risk of liability resulting from migration
 - Financing risks
 - Potential for change in highest and best use limited by contamination
 - Board increased cap rate by 1.5% and deducted annual RM costs

The Assessment Context



Haggerty Equipment Co. Ltd. [PAAB 1996 18803; SCBC A970220;
PAAB 1998 18803]

First Board Hearing

- Former dump site for ash from garbage incinerator. Metal contamination.
- Appellant's evidence: remediation would cost \$2 million and require removal of buildings.
- Negative value after allowing for costs and stigma
- Assessor's evidence that RA/RM approach sufficient.
Possibility groundwater treatment required.
- Assessor undertook comparative study of over 50 industrial land sales; no impact found.

The Assessment Context



Haggerty Equipment Co. Ltd. [PAAB 1996 18803; SCBC A970220;
PAAB 1998 18803] (Continued)

First Board Decision ...

- Assessor's evidence of “paired sales” not persuasive
- Board found economic risk would be taken into account by potential purchaser. On evidence, complete remediation not required.
- Value unimpaired reduced by:
 - Cost of studies
 - Possible cost of groundwater containment
 - Cost of groundwater treatment (deferred 5 years)
 - PV of annual costs, deferred 5 years

The Assessment Context



Haggerty Equipment Co. Ltd. [PAAB 1996 18803; SCBC A970220; PAAB 1998 18803] (Continued)

On Appeal...

- Board found to have erred in considering only purchaser's perspective
- Mere possibility of groundwater contamination not to be taken into account.

Board Reconsiders...

- Site assessment study costs deducted.
- Capital and monitoring costs for items deemed certain deducted
- On direction from court, no deduction made for “possible” cost items, despite evidence that there would be a fear of their existence.

The Assessment Context



Station 27 Holdings Ltd, Station 75 Holdings [PAAB 2005-10-00007]

- Gas station sites known to be contaminated
- Cost of remediation exceeds value
- Insufficient evidence for Board to conclude a “reasonable expectation” that remediation required.
- No pressing need to clean-up sites.
- Highest and best use agreed to be continuation of existing use – for 20 years
- “Value in Use” or “Value to Owner” argument by appellant rejected by Board
- Detailed site investigation costs deducted

Case Study (1)



Expropriation of Commercial Investment Property

- Retail property leased for next 10 years
- Significant new capital expenditure on building
- Contamination identified after expropriation
- Remediation cost estimated at up to 25% of value

Issues:

- Liability for contamination and remediation
- Extent of contamination
- Method and cost of remediation
- Need for remediation, absent the expropriation
- Effect of future uncertainty on value - relevance
- Continuation of existing use – impact on HABU

Case Study (2)



Valuation of Improved industrial Property

- Single storey industrial building adjacent to body of water
- Contaminants in soil and groundwater. Leachates entering water
- Foreshore remediation works exceed value of property
- Groundwater monitoring and pumping required
- Contaminants buried under building
- Remediation Order issued

Issues:

- Liability for some of works the responsibility of others - maybe
- Annual cost of monitoring and groundwater treatment
- Limited building life affects value in existing use
- Reversionary Land Value – Highest and Best Use
- Uncertainty and Risk

Case Study (3)



Valuation of Shopping Centre

- Shopping centre offered for sale
- Contaminants under building from dry-cleaner
- Removal of contaminants under building required

Issues:

- Purchaser did not want continuing liability
- Physical costs of removal undertaken by vendor
- Loss of revenue during clean-up process

Implications for Expropriations

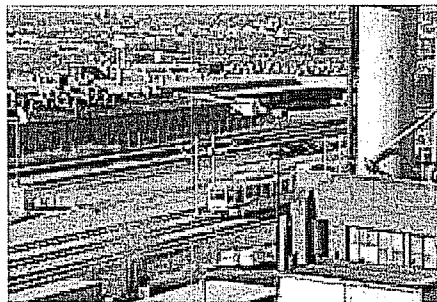


- **Liability**
 - Determination of liability
 - If others are responsible, how is value of owner's interest affected?
- **Costs**
 - What is best remediation solution?
 - Remediation standard for authority may be different than market
 - What is cost of remediation?
 - Who decides?
 - Who is responsible for costs of environmental/engineering studies?
- **Highest and Best Use**
 - Contamination could affect HABU
 - Implications of continuing existing use
- **Evidence**
 - Onus of proof?

Profile of A Brownfield Developer



CHEROKEE
Investment Partners



Cherokee is a private equity firm that **acquires** environmentally impaired assets, **remediates** them and **returns** them to productive use

- ☐ Lands purchased on “as is, where is” basis
- ☐ Typically all equity (minimum \$10million) raised from private investors
- ☐ On purchase, Cherokee assumes complete remediation responsibilities and liability for existing and future contamination
- ☐ Commenced 1990
- ☐ More than \$1 billion spent on 520 brownfield sites across US, Canada and Europe
- ☐ Investment to triple over next 15 years

Profile of A Brownfield Developer



Oakville, Ontario

- 9 acre site, formerly used for metal manufacturing
- Soil and groundwater contamination
- Metals, petroleum hydrocarbons and industrial solvents
- Soil remediation and groundwater monitoring undertaken
- Remediated use for subdivision and sale to developers and end-users

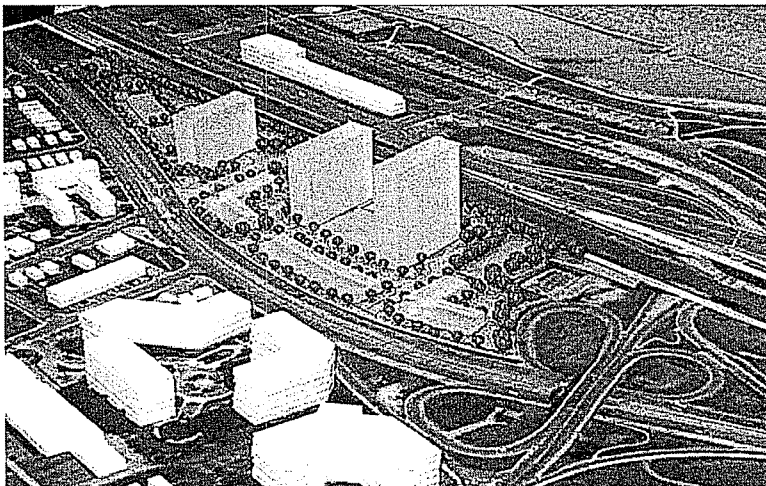


Profile of A Brownfield Developer



Toronto, West of Downtown

- Mixed-use revitalization of former steel plant – in use for over 100 years.
- 14.4 acre site contaminated with ponds and wetland filled with blast-furnace clinker, coal ash, building and demolition waste. Soils contaminated with petroleum products.
- Bioremediation, shoring and dewatering undertaken.
- Property rezoned from Industrial to residential.
- “Windermere by the Lake” comprises over 3 million sq. ft. of residential development.
- Site subdivided and sold to condominium developers



A Final Thought



“ Valuation of impaired properties is a developing body of knowledge...

...Consider these impaired valuation lessons as rungs on a ladder, not as the ladder itself.”